August 2004

Update: Criminal Procedure Monograph 6—Pretrial Motions (Revised Edition)

Part 2—Individual Motions

6.23 Motion to Dismiss Because of Double Jeopardy—Successive Prosecutions for the Same Offense

1. The "Same-Elements" Test Determines Whether Double Jeopardy Protection Is Implicated

Add the following case summaries to the May 2004 update to pages 51–52:

The rule requiring that all criminal charges arising from the same criminal episode be joined in a single trial—and thus, the rule prohibiting successive prosecutions based on the same criminal episode—does not apply where a defendant requests separate trials on offenses related to the same criminal episode. *People v Matuszak*, ___ Mich App ___, ___ (2004). In *Matuszak*, the defendant pleaded guilty to one CSC charge and proceeded, without objection, to trial on a second CSC charge. Both CSC charges arose from a single criminal episode about which the complainant gave conflicting testimony regarding the number of penetrations involved. The Court of Appeals denied the defendant's assertion that his two CSC convictions—one plea-based and one jury-based—violated double jeopardy principles. *Matuszak, supra*, ___ Mich App at ___. According to the Court, the defendant's conduct with regard to the two CSC convictions, pleading guilty to one count and proceeding to trial on the second, was the equivalent of requesting separate trials on related offenses and, therefore, did not implicate the defendant's double jeopardy protections. *Matuszak, supra*, ___ Mich App at ___.

Unless one crime is completed before the other crime takes place, a defendant's convictions for felony murder and for any necessarily included lesser offenses of the predicate felony violate the prohibition against double jeopardy. *People v Bulls*, ___ Mich App ___, ___ (2004). In *Bulls*, the defendant was convicted for felony murder based on armed robbery or attempted armed robbery and for assault with intent to rob while armed. The

defendant argued that his conviction for felony murder and his conviction for assault with intent to rob while armed violated the prohibition against double jeopardy. The prosecution argued that both convictions were proper under *People v Colon*, 250 Mich App 59, 62–63 (2002), because the defendant had completed his commission of the assault with intent to rob crime before the felony murder occurred. The Court of Appeals noted that attempted armed robbery is a necessarily included lesser offense of assault with intent to rob while armed so that conviction of the lesser offense and felony murder resulted in the same double jeopardy violation as would a separate conviction of attempted armed robbery and felony murder. The Court explained:

> "[D]uring trial the prosecution did not present the crimes of felony murder and assault with intent to rob while armed as separate incidents; rather it portrayed the facts in this case as a continuing sequence of events that culminated in the victim's death. We agree that the record supports the portrayal made by the prosecution at trial and establishes that the attempted armed robbery underlying defendant's convictions of felony murder and assault with intent to rob while armed was a continuing criminal enterprise. After forcefully entering the home, defendant and D-Mack walked the victim around at gunpoint while searching his home for items to steal. Only briefly before D-Mack shot the victim did defendant separate from D-Mack to enter a bedroom alone to search it. The fact that the attempted armed robbery continued throughout the entire criminal episode readily distinguishes this case from *Colon*, where the assaults were clearly separate events that took place over a ninety minute period, with the defendant ceasing one assault to search the premises and then later returning to beat the victim again. *Colon, supra* at 63–64." *Bulls, supra*, ___ Mich App at ___.

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6.30 Motion to Suppress Eyewitness Identification at Trial Because of Illegal Pretrial Identification Procedure

1. Right to Counsel

Near the bottom of page 68, replace the second sentence in the first paragragh with the following:

A defendant's right to counsel at corporeal identifications attaches at the time adversarial judicial criminal proceedings are initiated against that defendant. *People v Hickman*, ___ Mich ___, ___ (2004). In *Hickman*, the challenged identification took place "on-the-scene" and before the initiation of adversarial proceedings; therefore, counsel was not required. The Michigan Supreme Court's decision in *Hickman* overruled the Court's previous decision in *People v Anderson*, 389 Mich 155 (1973), where "the right to counsel was extended to all pretrial corporeal identifications, including those occurring before the initiation of adversarial proceedings." *Hickman, supra*, ___ Mich at ___. The *Hickman* Court acknowledged that the *Anderson* rule represented the "policy preferences" of that Court but that the rule lacked any foundational basis in state or federal constitutional provision. Both the federal and state constitutional provisions on which a criminal defendant's right to counsel are based are prefaced by the phrase, "In all criminal prosecutions, ..." Said the *Hickman* Court:

> "[I]t is now beyond question that, for federal Sixth Amendment purposes, the right to counsel attaches only at or after the initiation of adversarial judicial proceedings.
>
> This conclusion is also consistent with our state constitutional provision, Const 1963, art 1, § 20[.]" *Hickman, supra*, ___ Mich at ___.

The Court added that "identifications conducted before the initiation of adversarial judicial criminal proceedings could still be challenged" on the basis that a defendant's due process rights were violated by the identification's undue suggestiveness or by other factors unfairly prejudicial to the defendant.

6.32 Motion in Limine—Impeachment of Defendant by His or Her Silence

Insert the following language near the top of page 75 before Section 6.33:

A defendant must testify at trial to preserve for appellate review his or her challenge to the trial court's ruling in limine permitting the prosecution to introduce evidence of the defendant's post-*Miranda* silence. *People v Boyd*, 470 Mich 363, 365 (2004). The requirement that a defendant testify in order to contest the admission of his or her post-*Miranda* silence is necessary because a defendant's post-*Miranda* silence *is* admissible in one very specific context—to rebut a defendant's assertion at trial that he or she told the police something contrary to what actually occurred during the defendant's statement to police. *Id*.

In *Boyd*, the defendant was charged with CSC-I for his assault of the twelve-year-old complainant. After the defendant answered several of the questions posed to him during a police interview, the police officer asked the defendant, "When you last saw her [the victim], how many times did you have sex with her?" The defendant responded, "I am taking the fifth on that one." The police officer ended the interview immediately. *Boyd, supra*, 470 Mich at 366.

The defendant moved in limine to suppress that portion of his statement to police at which he invoked his Fifth Amendment right to remain silent. The trial court denied the defendant's motion and ruled that the defendant's entire statement to police was admissible as evidence against the defendant at trial. The prosecution did not seek to admit the defendant's statement at trial, nor was the statement referred to in the prosecution's opening or closing argument. The defendant did not testify at trial. He was convicted of CSC-II. *Boyd, supra*, 470 Mich at 366–367.

On appeal, the defendant argued that his decision not to testify at trial was based on the trial court's ruling in limine allowing admission of his post-*Miranda* silence. In consonance with previous state and federal case law, the *Boyd* Court declined to

> "assume that the possible introduction of the 'taking the fifth' statement motivated defendant's decision not to testify. . . . . Because numerous factors undoubtedly influence a defendant's decision whether to testify, we refuse to speculate regarding what effect, if any, a ruling in limine may have had on this decision." *Boyd, supra*, 470 Mich at 376.

The Court further disagreed with the defendant's assertion that the trial court's ruling was erroneous without regard to whether he testified at trial because his invocation of his Fifth Amendment right to remain silent was inadmissible against him at trial under any circumstances. According to the Court:

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> "[D]efendant's 'taking the fifth' statement would have been properly admissible in one context. The United States Supreme Court held in *Doyle* [*v Ohio*, 426 US 610, 619 (1976)], 'that the use for impeachment purposes of petitioners' silence at the time of arrest and after receiving *Miranda* warnings, violate[s] the Due Process Clause of the Fourteenth Amendment.' The Court recognized, however, that 'the fact of post-arrest silence could be used by the prosecution to contradict a defendant who testifies to an exculpatory version of events and claims to have told the police the same version upon arrest. *Id*. at 619 n 11."
>
> * * *
>
> "If defendant had offered exculpatory testimony at trial and claimed to have told his exculpatory story to the police in response to questioning, his silence would have been admissible for impeachment purposes." *Boyd*, *supra*, 470 Mich at 374–375.

In summary, the Court explained:

> "[D]efendant was required to testify to preserve for review his challenge to the trial court's ruling in limine allowing the prosecutor to admit evidence of defendant's exercise of his *Miranda* right to remain silent. Because the statement at issue in this case would have been properly admissible in one context, defendant's failure to testify precludes us from being able to determine whether the trial court's ruling was erroneous and, if so, whether the error requires reversal." *Boyd, supra*, 470 Mich at 378.

6.36 Motion to Suppress Evidence Seized Pursuant to a Defective Search Warrant

Insert the following case summary before Section 6.37 on page 87:

The Michigan Supreme Court adopted the "good-faith" exception to the exclusionary rule in *People v Goldston*, ___ Mich ___ (2004). The "good-faith" exception was first announced by the United States Supreme Court in *United States v Leon*, 468 US 897 (1984), as a remedy for automatic exclusion of evidence obtained from a law enforcement officer's reasonable, good-faith reliance on a search warrant later found to be defective. According to the *Goldston* Court:

> "The purpose of the exclusionary rule is to deter police misconduct. That purpose would not be furthered by excluding evidence that the police recovered in objective, good-faith reliance on a search warrant." *Goldston, supra*, ___ Mich at ___.

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